KU CHAH KU YA & ORS.

v.

LIM CHAI HAW & ANOR.

HIGH COURT MALAYA, ALOR SETAR
SYED AGIL BARAKBAH J
[CIVIL SUIT NO. 223 OF 1975]
21 JULY 1981

CIVIL PROCEDURE: *Statement of claim - Application for second extension of two months for amendment of statement - Whether action had been commenced within limitation period - Section 7(5) Civil Law Act and O. 15, O. 20 Rules of the High Court 1980 - Whether s. 7(7) had been complied with.*

The case was a Summons In Chambers on the part of the 2nd plaintiff for an extension of a further period of two months in order to amend the statement of claim. The 2nd plaintiff had already applied and been allowed to amend by a consent order of the Court on 4 April 1977. The order *inter alia* allowed the name of the 2nd plaintiff who had since died, to be deleted and substituted by the present plaintiffs in their capacity of administrators of the estate of the deceased, that the proceedings in the action be continued between them and the defendants and to make the necessary amendments to the statement of claim, including the title thereto within a period of two months from the date of the order. However, only the title to the writ and not the indorsement requiring the full particulars, was duly amended and instead of amending the statement of claim, the plaintiff's solicitors wrote to the defendant's solicitors to place the amendments in the Agreed Statement of Facts. The proposal was agreed upon and the statement was prepared and accepted. Due to an oversight, the claim pertaining to the dependency was not set out in the agreed statements. The present application was made in chambers but the matter was adjourned to open Court for argument on the defendants objecting to the application.

The action related to a joint claim for general and special damages by five plaintiffs for injuries sustained by them as a result of a motor accident. The alleged accident took place on 11 October 1974, and the writ with the indorsement of claim was filed on 19 August 1975 and the statement of claim on 11 November 1975. The 2nd plaintiff who filed the writ in his personal capacity, died on 16 December 1975, before the action could be heard.

The proposed amendment to the statement of claim was being sought by virtue of s. 7 of the Civil Law Act 1956 (the Act). Sub-section (1) provides that a person is liable to an action for damages if another is killed by his wrongful act or default, while sub-section (2) requires that every such action be for the benefit of the wife, husband, parent and child, if any, of the person whose death has been so caused.

The defendants' objections to the application were that:

(a) the earlier application was only for the amendment of the statement of claim, not of the indorsement of the writ, the case therefore being one of no indorsement on the writ at all, and not merely of a defective writ;

(b) if the latter application was allowed, it would deprive the defendants of their defence of limitation.

Held:

[1] The writ which still retained its original form was not only subsequently delivered on the defendants without leave of the Court but was also defective due to irregularity. The earlier application was only for the substitution of the administrator in place of the deceased plaintiff

and for the amendment of the statement of claim. Application for leave to amend the writ should also have been made as provided by O. 20 r. 1(3) and r. 5, which application could have been made *ex parte* (O. 15 r. 7).

The vital point in the case related to sub-section (7). This sub-section requires the complaint or writ or summons in such action to give full particulars of the person or persons for whom or on whose behalf the action is brought and the nature of the claim in respect of which damages are sought to be recovered.

[2] The present case had not been commenced within the limitation period owing to the improper service of a defective writ on the defendants. Sub-section (5) of s. 7 of the Act construed in line with O. 15 and O. 20 of the Rules of the High Court requires the bringing of the action as soon as leave for amendment of the writ and the substitution of parties has been obtained from the Court and that should be done within the limitation period.

Sub-section (5) limits the right of action in certain respects. It provides that no more than one action shall be brought in respect of the same subject-matter of complaint and that such action shall be brought within three years after the death.

[3] To grant the plaintiff leave again would certainly deprive the defendants of a defence of limitation which was open to them. A Court has no power to make an order directly negating a statutory provision (*Lee Lee Chung (f) v. Seow Peng Kwang* [1960] 26 MLJ 1, 6). On the other hand, had the plaintiff complied with the amendment to the statement of claim after obtaining leave from the Court, and had then served on the defendants, any technical defect amounting to an irregularity would have been cured even if the subsequent delivery had been well after the expiry of the limitation period. The Limitation Act only requires that the writ should be delivered within the prescribed time (*Pontin v. Wood* [1962] 1 QB 594).

Per: Syed Agil Barakbah J:

> The proper test in my view is as stated by Devlin J in *Hill v. Luton Corporation* [1951] 2 KB 387, 392, where the plaintiff in the first place is seeking the aid of the Courts, the Courts have determined that they will not grant it if to do so would be to deprive the defendant a defence otherwise open to him. On the other hand where the plaintiff needs no such assistance because the rules allow him as of right to deliver the statement of claim with his writ and thereby to remedy without leave any defect in the latter, the Court will not set aside the writ for defective indorsement.

[The application was dismissed with costs.]

Cases referred to:
Lee Lee Chung v. Seow Peng Kwang [1960] 26 MLJ 1
Pontin v. Wood [1962] 1 QB 594

Legislation referred to:
Civil Law Act 1956, ss. 7, (1), (2), (5)
Rules of the High Court 1980, O. 20 rr. 1(3), 5, O. 15 r. 7

For the plaintiff/applicant - Baldev Singh
For the defendants - Paul Manecksha

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Also found at [1982] CLJ 26